

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

Ronald Choate, and Alvin Baker, III	)	P & S Docket No. R-95-2
	)	
Complainants	)	
	)	
v.	)	
	)	
Clyde Boyd, and Livestock Auction	)	
of Cleburne, Inc. dba Cleburne	)	
Livestock Auction	)	
	)	
Respondents	)	Decision and Order

Preliminary Statement

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 et seq.). A complaint was timely filed on July 8, 1994, in which complainants seek reparation against the respondents in the amount of \$476.27, in connection with a transaction involving the sale of 16 cow/calf pairs.

Each of the parties was served with a copy of the Department's report of investigation. In addition, the respondents were served with a copy of the formal complaint. Respondent Boyd filed an answer thereto in which he denied any liability. As the amount in dispute did not exceed \$10,000.00, the written hearing procedure provided in Rule 13 of the Rules of Practice (9 C.F.R. §202.113) was followed.

In accordance with the Rules of Practice, the parties were given an opportunity to submit further evidence in this matter. Both parties elected to file additional evidence. In addition, the parties were given an opportunity to submit briefs but neither of the parties elected to file a brief.

Findings of Fact

1. Complainant, Ronald Choate ("Choate"), is an individual whose mailing address is Route 2, Box 171, Decatur, Texas 76234. Choate, at all times material herein, was engaged in business as a rancher, in Decatur, Texas.

2. Complainant, Alvin Baker, III ("Baker III"), is an individual whose mailing address is Box 95, Boyd, Texas 76023. Baker III, at all times material herein, was engaged in business as a rancher in Boyd, Texas.

3. Respondent, Cleburne Livestock Auction ("Cleburne Livestock"), is the trade name used by a corporation; Livestock Auction of Cleburne, Inc., whose business mailing address is P. O. Box 328, Cleburne, Texas 76033. At all times material herein, Cleburne Livestock was in the business of operating a posted stockyard under the Act with a principal place of business in Cleburne, Texas. Cleburne Livestock was selling livestock in commerce on a commission basis as a market agency, and was so registered with the Secretary under the Act.

4. Respondent, Clyde Boyd ("Boyd"), is an individual whose mailing address is 5016 Cockrell Avenue, Fort Worth, Texas 76133. Boyd is the Vice-President and fifty percent owner of Cleburne Livestock.

5. Johnny Joe Brown ("Brown"), Route 2 Box 762, Paradise, Texas 76073, a "cattle broker", advertised and negotiated the sale of the 16 cow/calf pairs on behalf of the complainants.

6. Boyd personally looked at the 16 pairs with Brown prior to making an offer to purchase the pairs.

7. On or about May 4, 1994, Brown conveyed to Baker III an offer from Boyd of \$900.00 per pair for all 16 pairs (total purchase amount of \$14,400.00). The offer was accepted. Transfer of possession was to take place on May 6, 1994, on the ranch where the pairs were located.

8. Boyd was the purchaser of the pairs.

9. The pairs were picked up on May 6, 1994, and shipped to Cleburne Livestock. Complainants, Choate and Baker III, expected payment on May 6th but payment was delayed.

10. Boyd had arranged to resell the pairs to a buyer. The resale of the pairs had been prearranged by Boyd. This buyer elected not to complete the purchase of the pairs from Boyd.

11. Boyd then consigned all 16 pairs to Cleburne Livestock. Boyd subsequently no-saled all 16 pairs and moved them to his ranch where he placed them on pasture.

12. On May 25, 1994, Boyd paid the complainants the full amount agreed upon for the pairs minus a three percent commission charge of \$432.00. The complainants are seeking reparation for this amount. The complainants also claimed interest expense on the pairs. The pairs were mortgaged. Due to the

length of time they waited for payment, the complainants state they were charged an extra \$44.27 in interest on the mortgage.

13. Complainants filed a written reparation complaint on this matter with the Packers and Stockyards Programs, GIPSA, on July 8, 1994. Complainants filing was within 90 days of the accrual of the cause of action.

#### Conclusions

The primary issue here is whether the respondents had a right to assess a commission against complainant's proceeds. The complainants contend that no authorization was given for either respondent to represent the complainants in the sale of their pairs. They contend, therefore, that neither respondent had a right to commissions from the complainants. The complainants state further that it is not customary for a livestock buyer to assess a commission.

The complainants state that they did pay a selling commission to Brown. Brown had been retained by the complainants to act as their selling agent. Brown was to advertise the sale of the pairs, search for a buyer, and negotiate the sale price and terms on the complainant's behalf.

Brown asserts that when livestock are unloaded at a market a selling commission will be charged by the market. This assertion is not correct. In-transit livestock may be unloaded at a market so that it may rest, be fed and watered, sorted, or be provided with other stockyard services. The market would have a right to charge the in-transit owner of the livestock for yardage, feed and water, or for other stockyard services provided. Unless the market provided actual selling services, however, the market would not be entitled to selling commissions.

Brown also maintains that when a transaction takes place on a market's premises, a selling commission is charged. Many markets do assess a fee for any private treaty sales conducted on their premises. Within the confines of this reparation, however, any selling fees that might have been assessed by Cleburne Livestock should have been paid by Boyd. Boyd purchased and took possession of the pairs before they arrived at Cleburne Livestock. Also, any such selling fees would have been paid to Cleburne Livestock, and not to an officer/owner of the market, such as Boyd.

Respondent Boyd states that he buys livestock in the country and routinely charges the seller a selling commission. To the extent such purchases are made as a dealer in interstate commerce, the assessing of selling commissions would be an unjust practice in violation of section 312(a) of the Act (7 U.S.C. 213) , and a violation of section 201.98 of the regulations (9 C.F.R. 201.98) promulgated under the Act. This section of the regulations states:

"No packer or dealer shall, in connection with the purchase of livestock in commerce, charge, demand, or collect from the seller of the livestock any compensation in the form of commission, yardage, or other service charge."

Respondent Boyd also stated that since he hauled the pairs to Cleburne Livestock and ran them through the ring, he had a right to a selling commission. We disagree. Boyd took possession of the pairs at a ranch five or six miles north of Boyd, Texas. At that point Boyd owned the cattle and had the right to dispose of the pairs as he saw fit. Ultimately he attempted to market the pairs by consigning them to Cleburne Livestock. Cleburne Livestock had a right to assess selling commissions, or no-sale fees, against the gross proceeds of the owner/consignor. Boyd was the owner of the pairs at the time of consignment to Cleburne Livestock. For these reasons Boyd was responsible to Cleburne Livestock for any selling commissions or no-sale fees.

A secondary issue was the age of the cows. The complainants make no mention of the age of the cows being a term of sale. In his affidavit, Boyd states that the cows were to be seven years of age or younger. In responding to the reparation report, Boyd stated that the cows were to be six years of age or younger. According to Boyd the cows did not conform to the terms of purchase because of their age. Three of the cows were broken mouthed and several others were eight or nine years old, he said.

Although Boyd states age was a condition of purchase, he made no arrangements for mouthing the cows or to otherwise investigate the age of the cows until the pairs arrived at Cleburne Livestock. Even after mouthing the cows at Cleburne Livestock, Boyd did not reject the pairs or request a modification of the purchase price due to the age of the cows. Indeed, when Boyd took a deduction of \$432.00 from the cost of the pairs, the deduction was not based on the age of the cows. There is no proof that the age of the cows was a material term of the contract.

The complainants briefly mention a grievance expressed by Boyd to them. Boyd told the complainants that Brown had represented himself (Brown) to Boyd as the owner of the pairs. Boyd, himself, makes no real issue of the ownership of the pairs. Boyd in fact states in a letter that the pairs were owned by Choate at the time of purchase. When Boyd issued payment for the pairs on May 25, 1994, Boyd issued his personal check to Choate. If Boyd had any concerns about the true ownership of the pairs, his fears were sufficiently assuaged by that time.

The most difficult issue presented in this case is whether Boyd, in purchasing the pairs, was operating as a dealer of livestock subject to the Act. The report is silent as to Boyd's status as a registered and bonded livestock dealer. Boyd states that when he purchased the pairs he had "a buyer" to resell the pairs to. Boyd was purchasing the pairs with the intention of reselling them on a dealer basis.

The relevant issues then become whether Boyd's purchase of the pairs involved a transaction conducted in interstate commerce and whether one transaction can subject a person to the Act.

We do not know if the "buyer" Boyd planned to resell the pairs to was an in-state (Texas) buyer or an out-of-state buyer. In any case, the resale of the pairs to this buyer did not proceed and Boyd decided to consign the pairs to Cleburne Livestock. This was done. Cleburne Livestock, a posted market, operates within the interstate flow of livestock. In consigning the pairs to Cleburne Livestock, Boyd placed the pairs into the interstate flow of commerce. Boyd thereby brought this transaction under the purview of the Act and made it subject to the Act's reparation proceedings.

As to whether one transaction can make a person subject to the Act, it has been held that a person can be subject to the Act in one isolated transaction, *Herzog v. Jarvis and Randall*, 29 A.D. 694 (1970); and *Newland v. Martin*, 30 A.D. 1443 (1971). It has been found that, "the terms 'practice' and 'practices' in §208(a) do not necessarily require repetitive acts. The term 'practice' may involve a single transaction if the unjust or unreasonable practice is among the evils the Packers and Stockyards Act was intended to remedy", *Mid-South v. Platte Valley Livestock*, 41 A.D. (1982).

The body of evidence in the report provides no justification for the commission deduction taken by respondent Boyd. Damages in the amount of \$432.00 with interest are due and payable to the complainants.

The complainants provided no supporting evidence for the \$44.27 additional interest expense claimed. Complainants in reparation proceedings have the burden of proving their claim by a preponderance of the evidence. As no substantiation of the \$44.27 interest expense was provided, this portion of the claim is denied.

The record contains no basis for believing that respondent Cleburne Livestock orchestrated the taking of commissions from the complainant's proceeds. There is also no evidence that Cleburne Livestock benefited from the deduction. We therefore see no reason to hold Cleburne Livestock responsible for any portion of the damages.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to the delegated authority, 7 C.F.R. §2.35, as authorized by the Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C. 1982 Ed., App. Pg. 1068. It constitutes "an order for payment of money" within the meaning of section 309(f) of the Act, 7 U.S.C. §210(f), which provides for enforcement of such an order by court action begun by complainant.

It is requested that, if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such action, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, D.C. 20250-1400. On a petition to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice (9 C.F.R. §202.117).

On a complainant's right to judicial review of such an order, see 5 U.S.C. §702-3 and United States v. I.C.C., 337 U.S. 426 (1949). On a respondent's right to judicial review of such an order, see Maly Livestock Commission v. Hardin et al, 446 F. 2d4, 30 Agric. 1063 (8th Cir. 1971); and Fort Scott Sale Co., Inc. v. Hardy, 570 F. Supp. 1144, 42 Agric. 1079 (D. Kan. 1983).

#### Order

Within 30 days from the date of this order, respondent Boyd, shall pay to complainants, Choate and Baker III, as reparation \$432.00 with interest thereon at the rate of 10 percent per annum from May 10, 1994, until paid.

The complaint is hereby dismissed as to respondent Livestock Auction of Cleburne, Inc.

Copies of this order shall be served upon the parties.

Done at Washington, D.C.

DEC 03 1996

**WILLIAM G. JENSON**

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JUDICIAL OFFICER  
Office of the Secretary